

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 15, 2007 Session

**DENVER and BEVERLY THACKER v. ALLAN M. BALL and DONNIE
BALL**

**Direct Appeal from the Circuit Court for Hawkins County
No. CV2234 Hon. John K. Wilson, Circuit Judge**

Filed June 27, 2007

No. E2006-01876-COA-R3-CV

Plaintiffs alleged that defendant Alan Ball's dog had injured Denver and sought damages. Defendant denied owning the dog and averred that his son, Donnie Ball, owned the animal. Plaintiffs amended their complaint adding Donnie Ball as a defendant, and further averred that Donnie Ball was acting as agent for Alan in caring for the animal. The Trial Court granted Alan Ball summary judgment on the issue of agency and in a trial a jury returned a verdict in Alan Ball's favor but awarded damages to plaintiffs against Donnie Ball. The Trial Court granted an additur to the damage award and plaintiffs appealed. We affirm the Judgment of the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

David W. Blankenship, Kingsport, Tennessee, for appellants.

Daniel D. Coughlin, Bristol, Tennessee, for appellee, Allan M. Ball.

OPINION

Background

Plaintiffs filed this action against Allan Ball, involving a dog allegedly owned by Ball. The Complaint stated that on May 28, 2004, Ball's dog had been allowed to roam free in violation of the leash laws, and while attempting to remove the dog from their property, the dog bit Denver

causing injury and resulting damages.

Appellee answered, stating the dog was owned by his son, Donnie, and that comparative fault should be applied between plaintiffs and Donnie.

Plaintiffs filed a Motion to Amend and added Donnie Ball as a defendant, since Allan Ball was alleging that Donnie owned the dog. The Amended Complaint alleged that Donnie was acting as agent, servant and employee of Allan in maintaining the dog and that Allan had originally purchased the dog. They further said that Donnie occupied the premises in question, and acted as an agent in maintaining the premises for Allan, because Allan paid all expenses.

Allan Ball filed a Motion for Summary Judgment after the Amended Complaint was filed, and in support of that Motion, Allan filed a Statement of Undisputed Facts with his affidavit wherein he stated that Donnie had never been employed by him. Allan testified that Donnie had never been his agent and had never received any wages or commissions from him. He stated that he allowed Donnie to live in the house on Carter Drive because Donnie had no other place to live and that while he paid the mortgage, utilities and other expenses on the house, except the yard mowing and cleaning, he had not done any maintenance on the house, and had moved out more than two years prior.

Donnie Ball's affidavit was filed, wherein he stated he had never worked for his father, and had never been his agent. His father had simply let him live in the house because he had nowhere else to live. He stated that he did mow the yard and clean the house, and he did so because he gratuitously lived there.

Responding to the Motion, the Court entered an Order granting summary judgment as to the plaintiffs' claims that Donnie was acting as an agent, servant, or employee of Allan, and those claims were dismissed, but all other claims were left intact. Following the jury trial, a verdict for judgment was entered on January 24, 2006, reciting that the jury found that Donnie Ball was at fault but Allan Ball was not, and awarded Mr. Thacker damages of \$20,000.00 but awarded no damages to Ms. Thacker.

Plaintiffs' Motion for a New Trial asserted that the Trial Court erred in failing and refusing to instruct the jury with regard to agency theories, that the Court erred in not allowing the plaintiffs' counsel to cross-examine Donnie Ball with respect to the complaint he failed to answer, and that the jury verdict was defective, in that it was too low.

The Trial Court entered an Order denying plaintiffs' Motion for a New Trial, except that the Court found that the amount of damages granted to Mr. Thacker was insufficient, and granted an additur to increase the Judgment to \$32,000.00. He found that no new trial was warranted on the issue of Mrs. Thacker's damages, and that Allan Ball should be given an award of \$789.00 in discretionary court costs.

The issues on appeal are:

1. Whether the Trial Court erred in granting partial summary judgment on the issue of agency?
2. Whether the Trial Court erred in denying plaintiffs' special request for instructions on the issue of agency?
3. Whether the Trial Court incorrectly limited the plaintiffs' cross-examination of Donnie Ball regarding his admissions with respect to the Complaint on the issue of agency?
4. Whether the Trial Court erred in refusing to allow the issue of agency go to the jury as a question of fact?
5. Whether the Trial Court erred in failing to properly supervise jury conduct with respect to the verdict form?
6. Whether the Trial Court erred in denying plaintiffs' Motion for New Trial?

Discussion

Plaintiffs argue there was a genuine issue of material fact regarding whether Donnie was Allan's agent, such that the issue should have been presented to the jury.

As our Supreme Court has explained:

Rule 56 comes into play only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Thus, the issues that lie at the heart of evaluating a summary judgment motion are: (1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial.

First, when the facts material to the application of a rule of law are undisputed, the application is a matter of law for the court since there is nothing to submit to the jury to resolve in favor of one party or the other. In other words, when there is no dispute over the evidence establishing the facts that control the application of a rule of law, summary judgment is an appropriate means of deciding that issue.

Second, to preclude summary judgment, a disputed fact must be "material". A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. Therefore, when confronted with a disputed fact, the court must examine the elements of the claim or defense at issue

in the motion to determine whether the resolution of that fact will effect the disposition of any of those claims or defenses. By this process, courts and litigants can ascertain which issues are dispositive of the case, thus rendering other disputed facts immaterial.

Third, when the evidence or proof in support of or in opposition to a summary judgment motion establishes a disputed fact, and the fact is material, as we have defined that term, the court must then determine whether the disputed material fact creates a genuine issue within the meaning of Rule 56.03. Proceeding from the premise that Rule 56 is intended to avoid unnecessary trials, the test for a "genuine issue" is whether a reasonable jury could legitimately resolve that fact in favor of one side or the other. If the answer is yes, summary judgment is inappropriate; if the answer is no, summary judgment is proper because a trial would be pointless as there would be nothing for the jury to do and the judge need only apply the law to resolve the case. In making this determination, the court is to view the evidence in a light favorable to the nonmoving party and allow all reasonable inferences in his favor. And, again, "genuine issue" as used in Rule 56.03 refers to disputed, material facts and does not include mere legal conclusions to be drawn from those facts.

Byrd v. Hall, 847 S.W.2d 208, 214-215 (Tenn. 1993).

In order to defeat Allan's motion seeking partial summary judgment, plaintiffs were required to show there was a factual dispute regarding whether Donnie was Allan's agent, that this disputed fact was material to the outcome of the case.

As this Court has previously said:

Determining whether an agency relationship exists requires an examination of the conduct and relationship between the parties. An agency relationship does not require an explicit agreement, contract or understanding between the parties. If the facts establish the existence of an agency relationship, it will be found to exist whether the parties intended to create one or not.

An agency relationship cannot be proven by the extrajudicial statements of the agent alone. Its existence must be traceable to the principal, because an agency relationship is created by the actions of the principal, not the actions of the agent.

Harben v. Hutton, 739 S.W.2d 602, 606 (Tenn. Ct. App. 1987)(citations omitted). Moreover, "[t]he burden of proving an agency relationship is on the person alleging its existence." *Sloan v. Hall*, 673 S.W.2d 548, 551 (Tenn. Ct. App. 1984).

In this case, plaintiffs presented no proof to show that Donnie was an agent of Allan. In *Miller v. Insurance Co. of North America*, 366 S.W.2d 909, 911 (Tenn. 1963), the Supreme Court

defined an agent as “[o]ne who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it.” Plaintiffs have not shown that Donnie was transacting any business for Allan, nor managing some affair for him, especially as concerns the keeping of the dog. As stated in 3 Am. Jur. 2d Agency § 2: “[i]n an agency relationship, whatever an agent does in the lawful prosecution of the transaction the principal has entrusted to him or her is the act of the principal. Thus, a prime element of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent. . . . Another characteristic of the agency relationship is that the agent has the power to bring about or alter business and legal relationships between the principal and third persons and between the principal and agent.”

Plaintiffs did not offer proof that there was any control over Donnie’s activities or conduct by Allan, nor that Donnie had the power to bring about or alter business and legal relationships between Allan and third persons. All that plaintiffs could show was that Allan allowed Donnie to live in his house, that Allan paid the bills, and that Donnie did some cleaning and yard work. There is no material evidence to establish an agency relationship with regard to Donnie’s dog.

As to the doctrine of respondeat superior, this Court has explained that “[t]o hold a principal liable for the acts of another, a plaintiff must prove (1) that the person causing the injury was the principal's agent and (2) that the person causing the injury was acting on the principal's business and acting within the scope of his or her employment when the injury occurred.” *Tucker v. Sierra Builders*, 180 S.W.3d 109, 120 (Tenn. Ct. App. 2005). Again plaintiffs have failed to offer material evidence that Donnie was acting on Allan’s business or acting within the scope of any employment in keeping the dog in question, or in letting it roam about. The Trial Court properly granted summary judgment on this issue, and as such, the Court properly rejected any requested instructions on the issue of agency.

Plaintiffs assert the Trial Court improperly restricted cross-examination of Donnie regarding his failure to answer the Complaint in respect to allegations of agency. Plaintiffs’ Brief, however, does not contain any argument regarding this issue, except to state that this issue was raised in their Motion for New Trial. As we have stated:

Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue. Moreover, an issue is waived where it is simply raised without any argument regarding its merits.

Bean v. Bean, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000)(citations omitted).

Assuming *arguendo* the plaintiffs did not waive this issue, it is without merit. This

Court has explained that “complete omission to answer must be taken advantage of by suitable application for default judgment, otherwise it is waived by proceeding to trial as if the pleadings were at issue.” *Edwards v. Edwards*, 501 S.W.2d 283, 290 (Tenn. Ct. App. 1973). The Trial Court did not abuse its discretion in refusing to allow Donnie’s failure to answer the allegations regarding agency to be characterized as admissions before the jury.

Next, plaintiffs raise an issue regarding whether the Trial Court erred in failing to properly supervise jury conduct with respect to the verdict form, asserting that the form was altered by the jury. However, again plaintiffs have failed to present any argument in their brief regarding this issue. As such, the issue is deemed waived. *See Bean*.

The issue that the Trial Court failed to properly supervise the jury is without merit.

Finally, plaintiffs argue the Trial Court erred in failing to grant their Motion for New Trial, but they fail to present any argument in their brief regarding this issue. The grant or denial of a new trial is discretionary with the trial judge, and cannot be relied on as ground for reversal unless an abuse of discretion is shown. *Esstman v. Boyd*, 605 S.W.2d 237 (Tenn. Ct. App. 1979). This issue is without merit.

The Judgment of the Trial Court is affirmed, and the cost of the appeal is assessed to Denver and Beverly Thacker.

HERSCHEL PICKENS FRANKS, P.J.